Fuji Food Products, Inc. *and* Nancy Sandra Gonzalez.
Case 21–CA–095997

February 19, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 15, 2014, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by enforcing its Confidential Information and Inventions Agreement (Agreement) in a manner that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton*, that maintaining the Agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practices with the Board.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

The Board has considered the decision and record in light of the exceptions and briefs, and, based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings and conclusions,[1] and adopt the recommended Order as modified and set forth in full below.[2]

[1] Although the Agreement does not explicitly restrict activities protected by Sec. 7, we agree with the judge in finding, based upon the parties' stipulation, that the Agreement has been enforced to compel arbitration on an individual rather than a class or collective basis. Accordingly, the Agreement has been applied to restrict the exercise of Sec. 7 rights, and is thus unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3–5 (2015); see also, *Employers Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2 (2015).

The Respondent argues that the complaint is time barred by Sec. 10 (b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Nancy Sandra Gonzalez, signed and became subject to the Agreement. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful Agreement during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's Agreement, constitutes a continuing violation that is not time barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the Agreement here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra, at 19–21. The Respondent enforced its Agreement on December 28, 2012, within the relevant 6-month period before the charge was filed and served.

To the extent the Respondent argues that Charging Party Gonzalez was not engaged in concerted activity in filing the State lawsuit in State court, we reject that argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2; see also *D. R. Horton*, 357 NLRB 2277, 2279. We reject the Respondent's argument that because Charging Party Gonzalez was no longer an employee at the time she filed her charge, the complaint based on her charge should be dismissed. The Board has long held that the broad definition of "employee" contained in Sec. 2(3) of the Act covers former employees. See *Briggs Mfg. Co*., 75 NLRB 569, 571 (1947). Accord: *Leslie's Poolmart, Inc.*, supra, 362 NLRB No. 184 slip op. at 1 fn. 2; *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 3 fn. 9 (2015). Moreover, Sec. 102.9 of the Board's Rules & Regulations provides that a charge may be filed by "any person," without regard to whether that person is a Sec. 2(3) employee.

In the absence of exceptions, we adopt pro forma the judge's conclusion that the Respondent abandoned its challenge to the complaint on the ground that the Acting General Counsel at the time the complaint issued was not properly appointed.

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Agreement is just such an unlawful restraint. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip at 4, 9 fns. 28, 29, and 31 (2015).

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

[2] Consistent with our decision in *Murphy Oil*, supra at 21, we adopt the judge's remedy and shall order the Respondent to reimburse Gonzalez and all other plaintiffs, if any, for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in State court to compel individual arbitration of her, or their, class or collective claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongful-

ORDER

The National Labor Relations Board orders that the Respondent, Fuji Food Products, Inc., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Confidential Information and Inventions Agreement (Agreement) that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing the Agreement in a manner that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the Agreement in any form that the Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the Los Angeles Superior Court in *Nancy Sandra Gonzalez v. Fuji Food Products, Inc.*, Case. No. BC487352, that it has rescinded or revised the mandatory arbitration agreement upon which it based its motion to dismiss Nancy Sandra Gonzalez' class and representative claims, and inform the court that it no longer opposes the lawsuit on the basis of the Agreement.

(d) In the manner set forth in this decision, reimburse Nancy Sandra Gonzalez and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that she, or they, may have incurred in opposing the Respondent's motion to stay the collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its facilities in Santa Fe Springs, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 28, 2012.

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ly sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

We shall also amend the judge's remedy to order the Respondent to notify the State court that it has rescinded or revised the Agreement and to inform the court that it no longer opposes Gonzalez' lawsuit on the basis of the Agreement.

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and we shall substitute a new notice to conform to the Order as modified.

We reject the position of the Respondent and our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, supra, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. February 19, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, the Respondent required employees to sign its Confidential Information and Inventions Agreement (the Agreement), which provided for the arbitration of non-NLRA employment-related claims. The Agreement was silent regarding class arbitration. Charging Party Nancy Sandra Gonzalez signed the Agreement and later filed a class action lawsuit against the Respondent in California State court alleging wage and hour violations. In reliance on the Agreement, the Respondent filed a motion with the court to compel individual arbitration of the Charging Party's claims. That motion is still pending.

My colleagues find that the Respondent violated NLRA Section 8(a)(1) under *Lutheran Heritage Village–Livonia*[1] on the basis that the Respondent applied the Agreement to require individual arbitration. In other words, it applied the Agreement as a waiver of class-type treatment of non-NLRA claims.[2] I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[3] I concur, however, in my colleagues' finding that the Agreement violates the Act because employees would reasonably read it to restrict or preclude filing charges with the Board.

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[4] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[5] This aspect of Section

[1] 343 NLRB 646 (2004).

[2] My colleagues rely on the Board's holding in *Lutheran Heritage*, which is sometimes referred to as *Lutheran Heritage* "prong three," that a policy, work rule or handbook provision will be unlawful if it "has been applied to restrict the exercise of Section 7 rights." Id. at 647. This differs from another holding in *Lutheran Heritage*, sometimes referred to as *Lutheran Heritage* "prong one," under which a policy, work rule or handbook provision is invalidated if "employees would reasonably construe the language to prohibit Section 7 activity." Id. I have expressed disagreement with *Lutheran Heritage* prong one, and I advocate that the Board formulate a different standard in an appropriate future case regarding facially neutral policies, work rules, and handbook provisions. See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), affd. sub nom. *Three D, LLC v. NLRB*, Nos. 14–3284, –3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). In the instant case, for the reasons noted in the text, I disagree with my colleagues' finding in reliance on *Lutheran Heritage* prong three that the Agreement has been unlawfully applied to restrict the exercise of Sec. 7 rights.

[3] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part); see also *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, 363 NLRB No. 57, slip op. at 3–5 (2015) (Member Miscimarra, dissenting). The Board majority's holding in *Murphy Oil* invalidating class action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[4] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, I agree with the Respondent that the Charging Party was not engaged in concerted activity when, acting individually, she filed a class action lawsuit in California State court. See my dissent in *Beyoglu*, above.

[5] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his

9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[6] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[7] and (iii) enforcement of a class action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[8] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement, as applied, was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to enforce the Agreement.[9] That the Respondent's motion was reasonably based is supported by court decisions that have enforced similar agreements.[10] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[11] I also believe that any Board finding of a violation based on the Respondent's motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.[12]

Accordingly, as to these issues, I respectfully dissent.[13]

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or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[6] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[7] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services,* No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[8] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[9] The Agreement is silent as to whether arbitration may be conducted on a class or collective basis. In finding the Respondent's motion to compel individual arbitration was nevertheless unlawful, my colleagues rely on *Countrywide Financial Corp.,* 362 NLRB No. 165 (2015). In *Countrywide Financial,* a Board majority decided that the employer violated the Act by moving to compel individual arbitration based on an arbitration agreement that, like the Respondent's, was silent regarding the arbitrability of class and collective claims. For the reasons stated in Member Johnson's dissent in *Countrywide Financial,* however, id., slip op. at 8–10, the Board's decision in that case is in conflict with the FAA and Supreme Court precedent construing that statute. The Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. Animal Feeds International Corp.,* 559 U.S. 662, 684–685 (2010) (emphasis in original). Obviously, where an arbitration agreement is silent regarding class arbitration, there is no such contractual basis. Thus, Respondent's motion to compel individual arbitration was "well-founded in the FAA as authoritatively interpreted by the Supreme Court." *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, above, slip op. at 4 fn. 11 (Member Miscimarra, dissenting); see also *Employers Resource,* 363 NLRB No. 59, slip op. at 3 fn. 9 (2015) (Member Miscimarra, dissenting); *Countrywide Financial,* above, slip op. at 9 (Member Johnson, dissenting).

[10] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[11] *Murphy Oil, Inc., USA v. NLRB*, 808 F.3d at 1021.

[12] I agree with my colleagues that the Charging Party's status as a former employee does not deprive her of standing to file and pursue the unfair labor practice charge here. I also agree with the majority's finding that the complaint is not time barred by Sec. 10(b).

[13] For the following reasons, however, I concur in my colleagues' finding that the Agreement unlawfully interferes with NLRB charge-filing in violation of Sec. 8(a)(1). Newly-hired employees were required to sign the Agreement. In pertinent part, it required employees

Dated, Washington, D.C. February 19, 2016

Philip A. Miscimarra Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Confidential Information and Inventions Agreement (Agreement) that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce the Agreement in a manner that requires our employees, as a condition of their employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the Agreement in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify current and former employees who were required to sign or otherwise become bound to the Agreement in all of its forms that the Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised Agreement.

WE WILL notify the court in which Nancy Sandra Gonzalez filed her collective lawsuit that we have rescinded or revised the Agreement upon which we based our motion to dismiss her collective lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose Gonzalez's collective lawsuit on the basis of that Agreement.

WE WILL reimburse Nancy Sandra Gonzalez and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that she, or they, may have incurred in opposing our motion to stay her lawsuit and compel individual arbitration.

FUJI FOOD PRODUCTS, INC.

The Board's decision can be found at http://www.nlrb.gov/case/21–CA–095997 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C., 20570, or by calling (202) 273-1940.

Cecelia F. Valentine, Esq., for the General Counsel.
Jason A. Geller, Esq., for the Respondent Company.
Matthew J. Matern, Esq., for the Charging Party.

to resolve by arbitration "all disputes relating to all aspects of the employer/employee relationship, . . . including, but not limited to . . . claims for wrongful discharge . . . [and] claims for violation of any federal . . . statute." For the reasons stated in my separate opinion in *The Rose Group d/b/a Applebee's Restaurant,* 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge-filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. Here, however, the Agreement does not qualify in any way the requirement that all claims for violation of any Federal statute must be resolved in binding arbitration and in this manner only. Without some further qualification, this language plainly precludes the filing of a Board charge. For these reasons, I join my colleagues in finding that the Agreement violates the Act by unlawfully restricting the filing of charges with the Board. See *U-Haul Co. of California,* 347 NLRB 375, 377(2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 22 fn. 4 (Member Miscimarra, dissenting in part); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 6–7 (Member Miscimarra, concurring in part and dissenting in part); *The Rose Group d/b/a Applebee's Restaurant*, above (Member Miscimarra, dissenting in part).

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving the alleged unlawful maintenance and enforcement of a mandatory-arbitration employment agreement. Nancy Sandra Gonzalez, the Charging Party, was initially hired by Fuji Food Products in July 2009. At that time, Fuji required her to sign a so-called "Confidential Information and Inventions Agreement" (CIIA). Among other things, the CIIA stated that she agreed, "as a condition of" and "in consideration for" Fuji's offer of employment, to resolve "all disputes relating to all aspects of the employer/employee relationship, . . . including, but not limited to . . . claims for wrongful discharge . . . [and] claims for violation of any federal . . . statute," by "final, conclusive and binding" arbitration. The CIIA did not, however, specifically address whether the disputes could be arbitrated on a class or collective basis.[1]

Gonzalez' employment with Fuji lasted about 3 months, until October 2009. However, she subsequently reapplied and was rehired a year later, in October 2010. At that time, Fuji no longer required new hires to sign the CIIA. Instead, Fuji required Gonzalez and other new hires to sign a document entitled "Employment Agreement" (EA). Unlike the CIIA, the EA did not include a mandatory arbitration provision.[2] Nor did it incorporate by reference the CIIA. Indeed, it stated that the EA "contains the entire agreement" between the parties concerning its subject matter and "takes priority over all previous agreements."

However, Fuji never rescinded the CIIAs signed by other, current employees who were hired before October 2010, were likewise required to sign the CIIA at that time, and never signed the EA. Further, as discussed below, Fuji continued to enforce the CIIA that Gonzalez signed in 2009.

Gonzalez continued to work at Fuji for about 9 months, until her employment again ended in July 2011. About 11 months later, in June 2012, she filed a putative class-action complaint in Los Angeles Superior Court, on behalf of herself and other unnamed similarly situated current and former Fuji employees, alleging wage and hour violations under the California Labor Code. *Nancy Sandra Gonzalez v. Fuji Food Products, Inc*., Case No. BC487352.

Gonzalez subsequently offered to submit the foregoing claims to class arbitration. However, Fuji rejected this proposal. Instead, on December 28, 2012, Fuji formally moved the court to dismiss and compel arbitration of the claims on an individual rather than a class basis "pursuant to the terms of the [CIIA] entered into between [Gonzalez] and Fuji" in 2009. In support, Fuji cited, inter alia, the Federal Arbitration Act (FAA) and the Supreme Court's opinion in *Stolt-Nielsen S.A. v. Animal Feeds International Corp*., 559 U.S. 662 (2010), which held that the parties' intent in entering an arbitration agreement controls, and that consent to class arbitration may not be presumed where, as here, the arbitration agreement is silent on the issue.

Gonzalez opposed Fuji's motion to compel individual arbitration, which remains pending before the court. In addition, several months later, in August 2013, she filed a motion to amend the lawsuit to add three named former employees as class representatives. This motion likewise remains pending before the court.

In the meantime, Gonzalez also filed the instant unfair labor practice charges with the Board. She filed the original charge, alleging that Fuji had unlawfully enforced the CIIA to prohibit class arbitration, on January 7, 2013. She filed the amended charge, alleging that the CIIA was also unlawful on its face because it interfered with employee access to the Board, on July 2, 2013.

On July 8, 2013, the General Counsel issued a complaint incorporating both allegations. Fuji timely filed an answer denying the allegations and asserting numerous defenses, and the case was therefore scheduled for hearing. However, on March 24, 2014, following several pretrial conferences, the parties jointly requested that the case be decided without a hearing based on a stipulation of facts.[3] The motion was granted the following day, and the parties subsequently filed briefs on April 29, 2014.

Having carefully considered the briefs and the entire stipulated record, for the reasons set forth below, I find that Fuji violated the Act as alleged.

I. ALLEGED UNLAWFUL ENFORCEMENT OF THE CIIA

As indicated by the General Counsel, Fuji's pending motion to compel individual arbitration of Gonzalez' class-action wage and hour suit pursuant to the CIIA is clearly unlawful under the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012) (holding that mandatory arbitration agreements requiring employees, as a condition of employment, to waive their right to pursue class or collective legal action in any forum, judicial or arbitral, violate Section 8(a)(1) of the Act). This is so notwithstanding that, unlike the "agreement" in *Horton*, the CIIA does not explicitly restrict the right to pursue class or collective relief in arbitration. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (a facially valid rule or policy may nevertheless violate Section 8(a)(1) if it is applied to restrict the exercise of rights protected by the Act).[4]

Fuji argues that it had a First Amendment right to file the motion with the state court. However, the First Amendment does not protect the right to file lawsuits or motions that have an illegal objective under the NLRA. See *Allied Trades Council (Duane Reade)*, 342 NLRB 1010, 1013 fn. 4 (2004), citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 738 fn. 5 (1983). As indicated above, Fuji's motion to compel individual arbitration pursuant to the CIIA clearly had an illegal objective under the Board's decision in *Horton*.

Fuji also argues that the Board's holding in *Horton* is incor-

[1] The relevant provisions of the CIIA are fully set forth as Appendix A to this decision.

[2] The only provision of the EA mentioning arbitration was a clause stating that the prevailing party shall be awarded reasonable attorneys' fees and other costs "if any legal action, arbitration, or other proceeding is brought."

[3] See Sec. 102.35(a)(9) of the Board's rules. Jurisdiction is admitted and well established.

[4] The General Counsel does not allege that the CIIA was unlawful on its face in light of the Supreme Court's opinion in *Stolt-Nielsen*, above.

rect, citing the Fifth Circuit's opinion on appeal (737 F.3d 344 (Dec. 3, 2013)) and numerous other Fderal and State court opinions rejecting it. However, I am required to follow Board precedent unless and until it is reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004), and cases cited there.

Fuji also argues that *Horton* is no longer good law in light of the Supreme Court's post-*Horton* opinions in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). However, the mandatory individual arbitration provisions at issue in those cases were contained in credit card use and acceptance agreements. The Court in those cases did not address the issue in the context of individual employment agreements and the well-established substantive right of employees under the NLRA to engage in concerted legal action against their employer. Moreover, there has been no indication from the Board itself that *Horton* is no longer good law in light of the Court's opinions.[5]

Fuji also argues that *Horton* is invalid because one of the participating members (Member Becker) was appointed by the President during an intrasession recess, citing the D.C. Circuit's 2013 opinion in *Noel Canning v. NLRB*, 705 F.3d 490. However, the Supreme Court has since rejected the D.C. Circuit's view that intra-session recesses are unconstitutional (___ S.Ct. ___, 2014 WL 2882090 (June 26, 2014)). Further, the Court's analysis suggests that recess appointments will be upheld if the recess lasted 10 days or longer. Member Becker was appointed during a 17-day intrasession recess.[6] Thus, his appointment appears to have been valid.[7]

Fuji also raises two other meritless defenses to the allegation. First, Fuji argues that Gonzalez lacked standing to file the underlying charge because she was not employed by Fuji at the time of the alleged unlawful conduct, and was therefore not protected by the NLRA. However, the statute places no limitation on who may file a charge. See Sec. 10 of the NLRA; and *NLRB v. Indiana & Michigan Electric Co*., 318 U.S. 9, 17 (1943). Nor does Section 102.9 of the Board's Rules, which states that a charge may be filed by "any person." Further, it is well established that the term "employee" under the Act includes former employees of the employer. See Section 2(3) of the NLRA; *Redwood Empire, Inc*., 296 NLRB 369, 391 (1989); *Waco, Inc*., 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977); and *Briggs Mfg. Co*., 75 NLRB 569 (1947).[8]

Moreover, Gonzalez and the other named and unnamed former employees in the state court lawsuit could obviously benefit from a Board order requiring Fuji to cease and desist from enforcing the CIIA in the manner alleged. The circumstances here are therefore clearly distinguishable from the cases cited by Fuji arising under other federal employment statutes where courts have denied former employees standing to seek class injunctive or declaratory relief pursuant to FRCP 23. See *Dukes v. Wal-Mart Stores, Inc*., 603 F.3d 571, 623 (9th Cir. 2010), revd. on other grounds 131 S.Ct. 2541 (2011).[9]

Second, Fuji argues that the complaint allegations are barred by the statutory 6-month limitations period because Gonzalez failed to file the underlying charge until several years after she signed the CIIA. However, it is well established that the maintenance and enforcement of an unlawful rule, policy, or agreement constitutes a continuing violation for purposes of tolling the Section 10(b) statute of limitations. See, e.g., *Carney Hospital*, 350 NLRB 627, 640 (2007); *Register Guard*, 351 NLRB 1110 fn. 2 (2007), enfd. in relevant part 571 F.3d 53 (D.C. Cir. 2009); and *Central Pennsylvania Regional Council of Carpenters*, 337 NLRB 1030 (2002), enfd. 352 F.3d 831 (3d Cir. 2003).

As indicated by Fuji, the continuing-violation theory is inapplicable where the maintenance and enforcement of an agreement outside the 6-month limitations period can only be found unlawful if the agreement was unlawfully executed within that period. See *Machinists Local 1424 (Bryan Mfg.) v. NLRB,* 362 U.S. 411 (1960) (allegation that employer and union unlawfully maintained and enforced a facially lawful union-security agreement outside the 10(b) period was barred because the allegation required the General Counsel to prove that the union lacked majority status, and that the agreement was therefore unlawful, at the time it was executed). And it is true that the Board in *Horton* only addressed and outlawed the maintenance and enforcement of mandatory individual arbitration agreements that employees had executed involuntarily, i.e., agreements that employees were required to execute as a condition of hire or continued employment.[10]

However, the CIIA states on its face that employees are required to sign it as a condition of employment. Thus, unlike

[5] A cursory search of the NLRB's website and Westlaw reveals numerous similar cases that have been pending before Board since the Court's 2012 and 2013 opinions issued. Thus, the reasonable assumption is that the Board is marshalling its arguments in those cases to persuade the Court to uphold *Horton*. In any event, I will not presume otherwise.

[6] See *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 218 (3d Cir. 2013) ("[Member Becker] was appointed during an intrasession break that began on March 26, 2010, and ended on April 12, 2010. This break lasted seventeen days and the Senate was indisputably not open for business.").

[7] Fuji's answer also challenges the complaint on the ground that the Acting General Counsel at the time was not properly appointed. However, Fuji appears to have abandoned this argument, presumably because there is no dispute that the current General Counsel was validly appointed and confirmed.

[8] Fuji does not contend that Gonzalez, or any of the three other former employees who have agreed to join her state court lawsuit as class representatives, abandoned the work force when their employment ended. Cf. *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

[9] Fuji also argues that Gonzalez was not engaged in concerted activity when she filed the lawsuit, as she was the sole named plaintiff and there is no evidence that she filed the lawsuit on the authority of any other employees, citing *Meyers Industries*, 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 108 S.Ct. 2847 (1988). I need not reach this issue given that three other former employees subsequently agreed to join the suit as class representatives, and Fuji did not thereafter withdraw its motion to compel individual arbitration of the claims.

[10] The Board in *Horton* did not address the 10(b) limitations issue, apparently because the defense was not raised by the respondent company in that case.

the parties' enforcement of the union-security provision in *Bryan Mfg*., Fuji's enforcement of the CIIA during the 10(b) period to require individual arbitration is not "perfectly lawful on the face of things," and proof that it is unlawful "plainly does not require resort to testimony about past events" (362 U.S. at 422 fn. 14).

Further, Gonzalez had no apparent reason to file a charge over the matter within 6 months of signing the CIIA. As indicated above, the CIIA is completely silent regarding class or collective arbitration. And the Supreme Court's opinion in *Stolt-Nielsen* that silence cannot be interpreted as consent to class arbitration (an opinion which effectively rejected contrary California court decisions)[11] did not issue until April 2010, after Gonzalez' initial 3-month period of employment had ended. Thus, Gonzalez had no reason or basis to file a charge that the CIIA prohibited class or collective arbitration at the time she executed and was covered by it.

Nor would Gonzalez have had a reason or basis to file a charge when she was rehired in October 2010. As indicated above, she was only required to execute the EA at that time, which did not contain a mandatory arbitration provision and expressly stated that it contained "the entire agreement" between the parties concerning its subject matter and took "priority over all previous agreements."

In sum, the first time Gonzalez had a reason or basis to file a charge regarding the individual arbitration issue was in late December 2012, when Fuji cited the 2009 CIIA as support for its motion to dismiss the class-action lawsuit and compel individual arbitration. Thus, as she filed the charge less than a month later, it was clearly timely. See generally *Salem Electrical Co*., 331 NLRB 1575 (2000); and *Leach Corp*., 312 NLRB 990 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995) (6-month limitations period does not begin to run until a party has clear and unequivocal notice, either actual or constructive, of a violation).

Finally, as discussed below, the complaint here also alleges that the CIIA on its face unlawfully interferes with the right of employees to file charges with the Board with respect to any and all future employment disputes. This is a separate issue that the Board in *Horton* and prior cases has not in any way suggested turns on whether the employees executed the arbitration agreement involuntarily.[12]

II. ALLEGED FACIAL OVERBREADTH OF THE CIIA

It is well established that mandatory arbitration provisions are unlawful if they would reasonably lead employees to believe that they could not file charges with the Board. See *D. R. Horton,* 357 NLRB 2277, at fn. 2 (2012), enfd. in relevant part 737 F.3d 344, 362 (5th Cir. 2013), and cases cited there. As indicated by the General Counsel, there is no basis to distinguish this precedent on the facts here. The CIIA provision on its face states that all employment disputes under federal law must be submitted to arbitration, and there is no exception for alleged unfair labor practices under the NLRA. Accordingly, it is clearly unlawful.

CONCLUSIONS OF LAW

Respondent Fuji Food Products, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act by the following conduct:

1. Requesting a state court, since December 28, 2012, to compel individual arbitration of the class-action wage and hour lawsuit filed against it by former employee Nancy Sandra Gonzalez, pursuant to the mandatory arbitration provisions of the "Confidential Information and Inventions Agreement" (CIIA) it required Gonzalez to sign as a condition of employment.

2. Maintaining, since at least January 2, 2013, provisions in the CIIA stating that employees must submit all employment-related disputes, including those arising under federal statutes, to final and binding arbitration.

REMEDY

The appropriate remedy for the violations found is an order requiring Fuji to cease and desist from its unlawful conduct and to take certain affirmative action. See, e.g., *Allied Trades Council,* and *Horton*, above. Interest on any monetary relief due shall be compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended[13]

ORDER

The Respondent, Fuji Food Products, Inc., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing the Confidential Information and Inventions Agreement (CIIA) by filing motions to prevent current or former employees from pursuing concerted or collective legal action against it in any forum, judicial or arbitral, with respect to claims arising out of their employment.

(b) Maintaining a mandatory arbitration agreement at its facilities that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board (NLRB).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw its December 28, 2012 motion to compel individual arbitration of the class-action claims in *Gonzalez v. Fuji*

[11] See the Second Circuit's underlying opinion in *Stolt-Nielsen* (which the Supreme Court reversed), 548 F.3d 85, 101 fn. 15 (2008).

[12] See also *BP Amoco Chemical-Chocolate Bayou*, 351 NLR 614 (2007); and *Hughes Christensen Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996), and cases cited there (upholding voluntary employee severance agreements that waive the right to file unfair labor practice charges over disputes that arose during employment, provided that the agreements do not also waive the right to file charges with respect to disputes arising in the future).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Food Products, Inc., Case No. BC487352, and notify Gonzalez in writing that it has done so.

(b) Reimburse Gonzalez for all reasonable expenses and legal fees incurred in opposing the foregoing motion to compel individual arbitration, with interest.

(c) Rescind or revise the CIIA to make clear that the agreement does not restrict employees' right to file charges with the NLRB.

(d) Notify all former and current employees who executed the CIIA and have been employed at its facilities at any time since January 2, 2013 of the rescinded or revised CIIA by providing them with a copy of the revised CIIA or by specifically notifying them in writing that the CIIA provisions have been rescinded for the reasons set forth in the Board's decision and order.

(e) Within 14 days after service by the Region, post at its facility in Santa Fe Springs, California, and any other facilities where it has maintained the unlawful CIIA provisions since January 2, 2013, copies of the attached notice marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities covered by the order, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at the facilities by the Respondent at any time since December 28, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 15, 2014

APPENDIX A

FUJI FOOD PRODUCTS, INC.
CONFIDENTIAL INFORMATION AND
INVENTIONS AGREEMENT

As a condition of my employment with Fuji Food Products, Inc., its subsidiaries, affiliates, successors, or assigns (together, the "Company"), and in consideration of my employment with the Company and my receipt of the compensation now and hereafter paid to me by [the] Company, I agree to the following:

. . . .

10. Arbitration and Equitable Relief

10.1 Arbitration.

EXCEPT AS PROVIDED IN SECTION 10.2 BELOW, I AGREE THAT ANY DISPUTE OR CONTROVERSY ARISING OUT OF, RELATING TO, ORCONCERNING ANY INTERPRETATION, CONSTRUCTION, PERFORMANCE OR BREACH OF THIS AGREEMENT, SHALL BE SETTLED BY ARBITRATION TO BE HELD IN LOS ANGELES COUNTY, CALIFORNIA, IN ACCORDANCE WITH THE RULES THEN IN EFFECT OF JAMS. THE ARBITRATOR MAY GRANT INJUNCTIONS OR OTHER RELIEF IN SUCH DISPUTE OR CONTROVERSY. THE DECISION OF THE ARBITRATOR SHALL BE FINAL, CONCLUSIVE AND BINDING ON THE PARTIES TO THE ARBITRATION. JUDGMENT MAY BE ENTERED ON THE ARBITRATOR'S DECISION IN ANY COURT HAVING JURISDICTION. THE COMPANY AND I SHALL EACH PAY ONE-HALF OFTHE COSTS AND EXPENSES OF SUCH ARBITRATION AND EACH OF US SHALL SEPARATELY PAY OUR COUNSEL FEES AND EXPENSES.

THIS ARBITRATION CLAUSE CONSTITUTES WAIVER OF EMPLOYEE'S RIGHT TO A JURY TRIAL AND RELATES TO THE RESOLUTION OF ALL DISPUTES RELATING TO ALL ASPECTS OF THE EMPLOYER/ EMPLOYEE RELATIONSHIP (EXCEPT AS PROVIDED IN SECTION 10.2 BELOW), INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING CLAIMS:

I. ANY AND ALL CLAIMS FOR WRONGFUL DISCHARGE OF EMPLOYMENT; BREACH OF CONTRACT, BOTH EXPRESS AND IMPLIED; BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING, BOTH EXPRESS AND IMPLIED; NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENT OR INTENTIONAL MISREPRESENTATION; NEGLIGENT OR INTENTIONAL INTERFERENCE WITH CONTRACT OR PROSPECTIVE ECONOMIC ADVANTAGE; AND DEFAMATION;

II. ANY AND ALL CLAIMS FOR VIOLATION OF ANY FEDERAL, STATE OR MUNICIPAL STATUTE, INCLUDING, BUT NOT LIMITED TO, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE CIVIL RIGHTS ACT OF 1991, THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE FAIR LABOR STANDARDS ACT, THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT, AND LABOR CODE SECTION 201, ET. SEQ.;

III. ANY AND ALL CLAIMS ARISING OUT OF ANY OTHER LAWS AND REGULATIONS RELATING TO EMPLOYMENT OR EMPLOYMENT DISCRIMINATION.

10.2 EQUITABLE REMEDIES

I AGREE THAT IT WOULD BE IMPOSSIBLE OR INADEQUATE TO MEASURE AND CALCULATE THE COMPANY'S DAMAGES FROM ANY BREACH OF THE COVENANTS SET FORTH IN SECTIONS 2, 3, 4, 5, AND 8 HEREIN. ACCORDINGLY, I AGREE THAT IF I BREACH ANY OF SUCH SECTIONS, THE COMPANY WILL HAVE AVAILABLE, IN ADDITION TO ANY OTHER RIGHT OR REMEDY AVAILABLE, THE RIGHT TO OBTAIN AN INJUNCTION FROM A COURT OF COMPETENT JURISDICTION RESTRAINING SUCH BREACH OR THREATENED BREACH AND TO SPECIFIC PERFORMANCE OF ANY SUCH PROVISION OF THIS AGREEMENT. I FURTHER AGREE THAT NO BOND OR OTHER

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

SECURITY SHALL BE REQUIRED IN OBTAINING SUCH EQUITABLE RELIEF AND I HEREBY CONSENT TO THE ISSUANCE OF SUCH INJUNCTION AND TO THE ORDERING OF SPECIFIC PERFORMANCE.

10.3 CONSIDERATION

I UNDERSTAND THAT EACH PARTY'S PROMISE TO RESOLVE CLAIMS BY ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THIS AGREEMENT, RATHER THAN THROUGH THE COURTS, IS CONSIDERATION FOR THE OTHER PARTY'S LIKE PROMISE. I FURTHER UNDERSTAND THAT I AM OFFERED EMPLOYMENT IN CONSIDERATION OF MY PROMISE TO ARBITRATE CLAIMS.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT enforce the Confidential Information and Inventions Agreement (CIIA) by filing motions to prevent you from pursuing concerted or collective legal action against us in any forum, judicial or arbitral, with respect to claims arising out of your employment.

WE WILL NOT maintain a mandatory arbitration agreement at our facilities that would reasonably be construed to bar or restrict your right to file unfair labor practice charges with the National Labor Relations Board (NLRB).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw our December 28, 2012 motion to compel individual arbitration of the class-action wage and hour claims filed against us in *Nancy Sandra Gonzalez v. Fuji Food Products, Inc*., Case No. BC487352, and notify Gonzalez in writing that we have done so.

WE WILL reimburse Gonzalez for all reasonable expenses and legal fees incurred in opposing our foregoing motion to compel individual arbitration, with interest.

WE WILL rescind or revise the CIIA to make clear that the agreement does not restrict your right to file charges with the NLRB.

WE WILL notify all former and current employees who executed the CIIA and have been employed at our facilities at any time since January 2, 2013 of the rescinded or revised CIIA by providing them with a copy of the revised CIIA or by specifically notifying them in writing that the CIIA provisions have been rescinded for the reasons set forth in the Board's decision and order.

FUJI FOOD PRODUCTS, INC.